Keep falls back on his 2002 academic paper for what is a legitimate MLM and an illegal pyramid scheme. (R.487,#3898, 3926.) However, determining whether a specific company was a pyramid scheme was “beyond the scope of this paper.” (R.487,#3902.) That paper focuses on an ideal MLM. (R.487,#3941.) Without any formal legal training, Keep purports to have synthesized findings from civil court cases and administrative FTC proceedings. (R.487,#3905-06.) But the court already ruled that he could not testify as to FTC regulations, so his reliance throughout his testimony on what he believed lessons were from FTC proceedings was improper. (R.486,#3830.) Another court barred such testimony, and this court should have as well. Keep “may not opine that defendants’ practices or alleged scheme do or do not satisfy the legal standards or elements for establishing the existence of a pyramid scheme*.” In re PFA Ins. Mktg. Litig.*, 2022 U.S. Dist. LEXIS 142011, at \*19 (N.D. Cal. June 15, 2022).

As the Government recognizes, the paper offered “an objective means of measuring the relative importance of retail sales to an MLM.” (Cite 2002 Paper; *see* Br.63.) But no court has relied on it. Critically, the 2002 paper offers a model of an ideal MLM. Failing to reach that standard is not a criminal offense, but Keep’s testimony made it one. This was improper.

In his testimony, Keep did not even use the objective test. Instead, he used an “intensely fact-specific analysis” to determine what a pyramid scheme is. (R.487,#3902.) He chose factors based on his personal preferences.

Specifically, Keep’s definition of a pyramid scheme (a legal term) was incorrect. “A pyramid scheme is an organization in which participants pay money for the right to obtain monetary rewards by enrolling new people into a program as opposed to selling products and services to the public. So the emphasis is on enrolling people in, not on selling to the public.” (R.486,#3742-43; *U.S. v. Mazumder*, 800 F. App’x 392, 395 (6th Cir. 2020)(expert may not define legal terms).

Keep incorrectly testified as a matter of law that internal consumption counts only as recruiting and not product sales. He does not look at the specifics of a company. Instead, he assumes that selling products means to the public. (R.487,#3896.) This was an incorrect statement of law. “[A]lthough eligibility for those rewards is predicated on recruitment, it is simplistic to say that those rewards are wholly ‘unrelated’ to ultimate user sales in practice.” *FTC v. Neora LLC*, Civil Action No. 3:20-cv-01979-M, 2023 U.S. Dist. LEXIS 217429, at \*49 (N.D. Tex. Sep. 28, 2023); *Whole Living, Inc. v. Tolman*, 344 F. Supp. 2d 739, 745 (D. Utah 2004)(“the fact that the right to receive a commission originates from sponsorship does not necessarily mean that all subsequent commissions are based primarily on recruitment.”); *Peterson v. Sunrider Corp.*, 48 P.3d 918, 929 (Utah 2002). *Amway* teaches that distributor consumption does not necessarily count as recruitment sales and that a legitimate MLM can have “a large portion of all sales” or a “significant amount” be internal sales. *In re Amway Corp.*, 93 F.T.C. 618, fn.24, 27 (1979).

Before trial, the Government recognized that the “discussion of internal consumption” was to be included in “jury instructions” and should not be presented by expert testimony. (R.405,#3092.) The Government violated its argument by having Keep testify to how internal consumption should be considered. Not only was this not in his province, but the court should have instructed on it. Barnes specifically requested the instruction to correct the misstatement of law: “I2G distributors may be considered ultimate users.” (R.533,#5090; *see* R.692,#9938.) Because the court did not give the instruction, the jury was left to believe that internal consumption did not count based solely on an assumption of Keep that relied on an inaccurate view of the law. This was devastating.

In addition, Keep reviewed marketing claims. He agrees that overwhelmingly companies rely on marketing claims to sell products. (R.487,#3912.) Companies in various industries make false claims. (R.487,#3944.) Keep, however, determines that false claims (based on his own determination of what is false) equate the company with being a pyramid scheme. There is no connection, however, and the testimony was irrelevant, prejudicial, and likely to confuse the jury. Further, the opinion was based on “[t]he ‘*ipse dixit* of the expert,’” which “is not sufficient to permit the admission of an opinion.” *Madej v. Maiden*, 951 F.3d 364, 375 (6th Cir. 2020). The record shows there is nothing to support the tie between false marketing claims and a company operating as a pyramid scheme. The court’s decision to allow this testimony is reversible error.

The Government called Keep as a witness to establish facts and lay out the narrative that the sale of Emperor packages was a pyramid scheme. The Government called him before establishing any facts and used him as a fact witness to claim that the sale of Emperor packages was pyramid scheme. This was improper testimony barred by FRE 702. The statement of facts is littered with “facts” that are only supported by Keep’s secondhand testimony. (Br.6-7, 9, 11-13, 16-17, 22(citing only R.486 or R.487.) The Government’s arguments in response also have points that are entirely dependent on facts presented by Keep. (Br.34-37, 40, 85, 98-99, 129.)

“‘[A]n expert cannot be presented to the jury solely for the purpose of constructing a factual narrative based upon record evidence.’” *Schall v. Suzuki Motor of Am.*, No. 4:14-CV-00074-JHM, 2020 U.S. Dist. LEXIS 41278, at \*16 (W.D. Ky. Mar. 10, 2020)(quoting *In re Fosamax Prods. Liab. Litig.*, 645 F. Supp. 2d 164, 192 (S.D.N.Y. 2009)). “Whatever expertise O’Shea may possess, no expert may ‘supplant the role of counsel in making argument at trial, and the role of the jury [in] interpreting the evidence.’” *Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 469 (S.D.N.Y. 2005)(quoting *Primavera Familienstiftung v. Askin*, 130 F. Supp. 2d 450, 529 (S.D.N.Y. 2001)). “As plaintiffs’ Rezulin ‘historian,’ therefore, Dr. Gale ‘does no more than counsel for plaintiff will do in argument, i.e., propound a particular interpretation of [defendant]'s conduct.’” *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 551 (S.D.N.Y. 2004). “Expert testimony is also inadmissible if it simply ‘presents a narrative of the case which a lay juror is equally capable of constructing.’” *Taylor v. Cty. of Pima*, 2023 U.S. Dist. LEXIS 51815, at \*9 (D. Ariz. Mar. 24, 2023). Keep interpreted evidence that the Government gave him, told the Government’s narrative, and took the place of the jury. The Government also used Keep’s testimony to play inadmissible hearsay. For example, it played a Qubeey promotional video about the fact that it was free; even though the video was inadmissible hearsay. The video had no probative value, and it was unfairly prejudicial as the Government asked the jury to infer that the I2G Touch was the same product as Qubeey; even though the record does not support the inference. At bottom, the probative value did not substantially outweigh their prejudice, and the court erred in allowing the video to play. FRE 703.

The Government also asked Keep whether he understood the I2G Touch was fully functional by the fall of 2013. The Government relies on this as factual evidence: “The I2G Touch was not yet fully functional by fall 2013.” (Br.11 (citing R.486:#3811-3812(Keep’s testimony)). Additionally, the Government relies on Keep’s testimony for the proposition that “[t]here was no consumer demand for the I2G Touch at the price that I2G was selling it.” (Br. 12.) But there was no factual testimony to support it. There was no analysis that a promotional video of Qubeey shows no market for the I2G Touch, especially as I2G continued to improve it and add features.

Keep opined that Emperors could not make money from the casino: “It’s not going to happen.” (R.486,#3778-79.) But Keep did not base his evidence on contemporaneous evidence. Nothing about I2G’s compensation plan or its model prevented it from growing its casino to hundreds of millions of dollars. There were no impediments to growth identified by Keep. Fraud cannot be proven by hindsight, and his opinion is not based on any information to support it. “An admissible expert’s opinion, it is clear, ‘must be supported by more than subjective belief and unsupported speculation . . . .’” *Graham v. Am. Cyanamid Co.*, 350 F.3d 496, 510 (6th Cir. 2003) (quoting *McLean v. 988011 Ontario Ltd.*, 224 F.3d 797, 800-01 (6th Cir. 2000). Moreover, the court “must confirm that the ‘factual underpinnings of the expert's opinions were sound.”  *U.S. v. Martinez*, 588 F.3d 301, 323 (6th Cir. 2009)(quotation omitted). There were no factual underpinnings. It was his subjective belief that the casino would not reach the heights needed for Emperors to recoup their money, but that cannot support the factual testimony that it’s “not going to happen.” (R.486,#3778-79.) The opinion should have been excluded.

Keep’s testimony that participants paid a monthly fee for the I2G Touch subscription in addition to the upfront fee for the license was not based on the facts in the record. Instead, the facts conclusively showed that the monthly fees were waived.

Not only did Keep’s testimony lack an evidentiary basis, he also testified falsely. (*See* \_\_\_.) Keep was a key Governmental witness who testified falsely and testified to secondhand facts that had no support. The prejudice was extreme.

Keep wrongly testified to mental state. The court instructed that a pyramid scheme was a scheme to defraud, and a scheme to defraud was a plan or course of action in which a participant “intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.” (R.554,#5265.) Because Keep testified that the defendants were engaged in a pyramid scheme, he necessarily was testifying that they “intend[ed] to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.” (*Id.*) This is exactly what FRE 704(b) prohibits: “A prohibited ‘opinion or inference’ under Rule 704(b) is testimony from which it necessarily follows if the testimony is credited, that the defendant did or did not possess the requisite *mens rea*.” *U.S. v. Morales*, 108 F.3d 1031, 1037 (9th Cir. 1997); *see* 2011 Advisory notes to FRE 704 (noting that textual change is not substantive.)

The Government argues that “Keep was explaining that an Emperor could make money far more easily through recruitment than through the online casino.” (Br.67.) But that opinion also is not true. Rather, Keep was cherry-picking how a participant could make money through the casino. “[C]herry-picking data is just as bad as omitting it or making it up altogether.” *U.S. v. Lang*, 717 F. App’x 523, 536 (6th Cir. 2017). Participants could drive traffic to the casino and receive 25% of what was bet. Therefore, they had a very realistic chance of making money from the casino. Also, they could sell a number of product packages. The Government has not offered any evidence to show that these were recruitment-based instead of product-focused. Instead, it relies on the wrong assumption by Keep that internal consumption counts as recruitment only instead of purchases of products. Regardless, Keep’s decision to only rely on one way a participant could make money from the casino is simply a means by which he cherrypicked the data to support his conclusion.

Not only did he cherry-pick this information, but all of his testimony regarding certain video clips took statements out of context to give an unsupported opinion that the defendants made false claims and focused on recruiting. By parsing out isolated statements, the Government had Keep opine on a small subset of the calls and videos that were in evidence. This caused Keep’s opinion to be just as bad as if he had made up the facts supporting it altogether.

The errors with Keep’s testimony do not stop there. Keep also testified regarding the credibility of declarants. In response to the arguments that Keep acted as a lie detector, the Government argues that he gets to make specific calls on whether the defendants lied, made misstatements, made overstatements, and were disingenuous, and there is nothing wrong with that. The Government does not offer any specific case law to support this novel argument. Instead, it generally points to *In re Scrap Metal*, but that does not say experts can testify as to declarants’ credibility. Rather, controlling provides that “determining the credibility of witnesses [and declarants] is a task for the jury.” *U.S. v. Sadler*, 24 F.4th 515, 542 (6th Cir. 2022); *U.S. v. Hill*, 749 F.3d 1250, 1263 (10th Cir. 2014). Keep usurped that role. He testified that Hosseinipour’s “statements about the quality of the product relative to what’s on the market” were “not true.” (R.486,#3825.) He testified to overstatements, “extreme statements,” “could not be true” statements, “gross overstatement[s],” “unverifiable statements,” “disingenuous” statements, and more “overstatements.” (*Id.*; R.486,#3828-34.) As to Maike, he testified that the declarant’s statements were “unsupportable,” “cannot be true,” and were a “gross overstatement of what might be possible.” (R.486,#3821, 36.)

To save the conviction, the Government argues that marketing professors who write academic papers on pyramid schemes essentially get to testify regarding false statements made by declarants, thereby attacking their credibility. The Government suggests that any prejudice can be corrected by cross-examination. However, the damage was done by the time the defendants had the opportunity to cross-examine Keep. He had already played the role of jury and told the jury what credibility determinations to make about the defendants in this case. There was no putting the genie back in the bottle, and the Government has offered no support for its erroneous position. *See U.S. v. Scheffer*, 523 U.S. 303, 313 (1998)(“A fundamental premise of our criminal trial system is that ‘the jury is the lie detector.’”).

The admission of US-1 was also highly improper and prejudicial and requires reversal. Keep agreed that the structure of I2G based on its compensation structure would not look like US-1. (R.487,#3931.) Where a participant was in the tree had no impact on whether he or she could earn money. (R.498, #4143 (“Well, it’s a tree, not a pyramid;” R.498, #4183; R.498, #4251 (At Level 57, a participant could still make money at I2G.)) The Government made the jury believe that the sale of Emperor packages was a pyramid scheme by eliciting testimony that I2G worked like US-1, but that evidence was false and highly prejudicial. It also testified that participants in the lower levels were doomed to fail, but the Government knew that geometrical progression testimony had no place in this prosecution. The “United States has no plans to argue that ‘the laws of geometrical progression would make it impossible to recruit continually since inevitably a point of saturation would be reached.’” (R.381,#2923.) I2G could not get to the levels shown in the chart, and I2G would not have the number of participants. Nothing about it helped the jury. Instead, it was just used for the jury to infer that I2G was a pyramid scheme.